Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG21 OF 1992 (III)
RICHARD MALANJUM JC
5 MAY 1993

Civil Procedure *— Jurisdiction — Whether appellate court can substitute finding of fact by trial court*

Civil Procedure *— Trial — Whether issue not raised in pleadings can be considered at trial — Whether court can consider such an issue in coming to a decision*

Insurance *— Marine insurance — Damage to goods — Subrogation — Whether insurer has cause of action of his own against the wrongdoer*

Shipping and Navigation *— Practice — Requirement that notice in writing be given within three days of loss or damage — Whether non-compliance with notice provisions under the law fatal — Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Ship Owners and Others) Regulations 1960*

Shipping and Navigation *— Practice — Whether carrier can restrict liability — Burden of proof on carrier to show protection from liability*

Civil Procedure *— Trial — Whether document not tendered at trial can be considered at appeal stage*

The respondent imported 326 packages and bags of spices ('the goods') from Singapore. Amongst the goods were 100 bags of dates. The respondent utilized the appellant's vessel, 'Lin Petaling III' to bring the imported goods to Kuching, Sabah. The terms of the relationship between the appellant and the respondent were contained in a bill of lading issued by the respondent. When the respondent went to clear the goods from the port, he discovered 53 bags of dates were missing. The respondent has been indemnified by the insurance company in the amount of RM1,354.20. This action is brought against the appellant by the insurance company under the doctrine of subrogation. At the end of the full trial, the learned magistrate awarded RM1,354.20 as special damages and interest at the rate of 8%pa from the date of judgment until the date of settlement to the respondent. The learned trial magistrate refused to award any general damages and the respondent did not appeal on this issue. The appellant has appealed against the decision of the learned magistrate.

Held, dismissing the appeal:

(1) An appellate court should not substitute a finding of fact by the trial court without a valid reason.

(2) An issue not pleaded in the statement of defence cannot be raised as grounds of appeal as that would be in contravention of O 18 r

8 of the Rules of the High Court 1980. It is not the function of the court to consider such an issue in coming to a decision except in certain cases for instance where illegality is ex facie or where the evidence adduced at a trial clearly shows there is illegality. Parties are bound by their pleadings and if other issues are desired to be raised during trial, they must be pleaded by way of amendments.

(3) The doctrine of subrogation applies where an insured brings an action against the wrongdoer if called upon to do so by the insurer; but it is his own cause of action and not of the insurer. As against the wrongdoer, the insurer has no cause of action of his own. The insurer is therefore entitled to enforce the right of action against the wrongdoer in the name of the insured. Even in the absence of a formal assignment, if there was evidence that the insurance company concerned had paid under the insurance policy, it was entitled to the benefit of all rights possessed by the insured.

(4) The requirement under the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Ship Owners and Others) Regulations 1960 ('the Regulations'), that a notice in writing must be given within three days of the loss or damage to the goods is not a time limitation provision. As long as the respondent can prove that he has suffered loss or damage, he can succeed.

(5) Article III r 8 of the Regulations prevents a carrier from restricting his liability for carrying out an operation which under the contract it had agreed to perform. The burden is on the ship owners to prove that they were protected from liability under the Regulations.

Per curiam:

A document not admitted as an exhibit at the trial proceedings by a party withholding it will attract the effect of s 114(g) of the Evidence Act 1950. Such a document not tendered at the trial will not be considered at the appeal stage.

[Bahasa Malaysia summary

Penentang telah mengimpot 326 bungkusan dan beg rempah ('barang-barang itu') dari Singapura. Di antara barang-barang itu terdapat 100 beg buah korma. Penentang telah menggunakan kapal perayu, 'Lin Petaling III' untuk membawa barang-barang impot itu ke Kuching, Sabah. Terma-terma hubungan di antara perayu dan penentang terkandung di dalam suatu bil muatan yang telah dikeluarkan oleh penentang. Apabila penentang pergi mengambil barang-barang itu dari pelabuhan, beliau mendapati bahawa 53 beg buah korma telah hilang. Penentang telah dibayar ganti rugi berjumlah sebanyak RM1,354.20 oleh syarikat insurans. Tindakan ini di bawa oleh syarikat insurans terhadap perayu di bawah doktrin subrogasi. Pada kesudahan perbicaraan penuh, majistret yang arif telah mengaward kepada penentang RM1,354.20 sebagai ganti rugi khas dan faedah sebanyak 8% setahun dari tarikh penghakiman sehingga tarikh penyelesaian.

Majistret yang arif enggan mengaward apa-apa gantirugi am dan penentang tidak membuat rayuan atas isu ini. Perayu membuat rayuan terhadap keputusan majistret yang arif itu.

Diputuskan, menolak rayuan itu:

(1) Mahkamah rayuan tidak patut mengganti suatu keputusan fakta oleh mahkamah perbicaraan tanpa sebab yang sah.

(2) Satu isu yang tidak dinyatakan dalam pernyataan pembelaan tidak boleh dibangkitkan sebagai alasan rayuan kerana ini akan melanggar A 18 k 8 Kaedah-Kaedah Mahkamah Tinggi 1980. Bukanlah menjadi fungsi mahkamah untuk mempertimbangkan isu seperti itu apabila membuat keputusan kecuali dalam kes-kes tertentu umpamanya apabila kepenyalahan undang-undang adalah ex facie atau apabila keterangan yang dikemukakan di dalam perbicaraan jelas menunjukkan bahawa terdapat kepenyalahan undang-undang. Pihak-pihak terikat oleh pliding mereka dan jika mereka ingin membangkitkan isu-isu yang lain di dalam suatu perbicaraan, isu-isu itu haruslah dikemukakan melalui cara pemindaan.

(3) Doktrin subrogasi terpakai apabila pengambil insurans membawa suatu tindakan terhadap orang yang bersalah itu apabila diminta membuat demikian oleh penanggung insurans; tetapi ini merupakan kausa tindakannya sendiri, dan bukan kausa tindakan penanggung insuran. Penanggung insurans tidak mempunyai kausa tindakan tersendiri terhadap orang yang bersalah itu. Oleh yang demikian, penanggung insurans itu berhak menguatkuasakan hak tindakan mereka atas nama pengambil insurans terhadap orang yang bersalah itu. Walaupun tidak terdapat serahhak yang formal, jika terdapat bukti bahawa syarikat insurans itu telah membayar di bawah polisi insurans itu, mereka berhak mendapat manfaat dari semua hak yang di miliki oleh pengambil insurans.

(4) Keperluan di bawah 'Merchant Shipping (Implementation of Conventions relating to Carriage of Goods By Sea and to Liability of Ship Owners and Others) Regulations 1960' ('Peruntukan itu'), bahawa notis bertulis mesti diberi dalam masa tiga hari untuk melaporkan kehilangan atau kerosakkan bukanlah satu peruntukan menghad masa. Selagi penentang boleh membuktikan kerugian atau kerosakkan itu, beliau boleh berjaya.

(5) Perkara III k 8 Peruntukan itu melarang seseorang pengangkut daripada menghadkan liabilitinya apabila melaksanakan sesuatu operasi yang telah dipersetujui olehnya di bawah kontrak itu. Beban adalah atas tuanpunya kapal untuk membuktikan bahawa mereka terlindung daripada liabiliti di bawah Peruntukan itu.

Per curiam:

Suatu dokumen yang tidak dikemukakan sebagai eksibit dalam prosiding perbicaraan oleh pihak yang menyembunyikannya akan menarik kesan s 114(g) Akta Keterangan 1950. Dokumen yang tidak

dikemukakan di perbicaraan itu tidak akan dipertimbangkan dalam peringkat rayuan.]

Notes

For cases on marine insurance, see 8 *Mallal's Digest* (4th Ed) paras 52–74.

Cases referred to

1 *JB Jeyaratnam v Law Society of Singapore* [1988] 3 MLJ 425 (folld)
2 *Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor* [1988] 3 MLJ 478 (folld)
3 *'The American Astronaut'* [1979] 1 MLJ 216 (refd)
4 *'Lexa Maersk'* [1974] 2 MLJ 183 (refd)
5 *Wilson v Raffolovich* (1881) 7 QBD 553 (refd)
6 *Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125 (folld)
7 *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (folld)
8 *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 (folld)
9 *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 (folld)
10 *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99 (folld)
11 *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1928] AC 223; [1928] All ER 97 (refd)
12 *Steel v The State Line Steamship Co* (1877) 3 App Cas 72 (refd)

Legislation referred to

Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Ship Owners and Others) Regulations 1960

Anthony Bong (*Ibrahim & Co*) for the respondent.
Margaret Loy (*Matthew TK Chan & Co*) for the appellant.

Cur Adv Vult

Richard Malanjum JC: This is an appeal by the appellant against the decision of the learned trial magistrate made in favour of the respondent in an action commenced by the respondent against the appellant in relation to a loss of 53 bags of dates (hereinafter called 'the goods') imported by the respondent from Singapore. The appellant was the carrier of the goods by its vessel named 'Lin Petaling III'. At the end of a full trial the learned trial magistrate only awarded the sum of RM1,354.20 being the special damages claimed by the respondent together with interest at the rate of 8%pa from the date of judgment to the date of settlement plus both fixed costs and solicitor and client costs. The learned trial magistrate refused to award general damages and there is no appeal on the issue.

At the commencement of the hearing of this appeal learned counsel for the appellant applied to amend the memorandum of appeal and with the learned counsel for the respondent not objecting I therefore granted the application.

The amended grounds of appeal of the appellant are therefore as follows:

(1) That the learned magistrate erred in fact in holding that the fifty three (53) bags of dates were missing during the period when the goods were loaded onto the vessel and before they were unloaded from the vessel when in fact it has been proven that the fifty three (53) bags of dates were in fact missing after they were discharged from the vessel.

(2) That the learned magistrate erred in fact and in law in holding that the defendant is liable to the plaintiff for the loss of fifty three (53) bags of dates for the period of time after they were loaded onto the vessel and before they were unloaded from the vessel.

(3) That the learned magistrate erred in law in holding that there is no need for the insurance company to plead subrogation when the legal principles which the learned magistrate based her decision on for so holding were not referred to in her judgment.

(4) That the learned magistrate erred in law in construing that cl 4(B) of the bill of lading (exh P1) is only applicable in a situation where the goods had deteriorated and turned bad rather than total disappearance of the goods altogether when in fact on a proper reading of the said cl 4(B) such construction is most unreasonable.

(5) That the learned magistrate erred in law in holding that the plaintiff is entitled to the claim of RM1,354.20 on the basis that it is in fact a claim by an insurance company when in fact the statement of claim was pleaded in such a way that it was a claim by the plaintiff on his own behalf.

(6) That the learned magistrate erred in law in holding that the plaintiff is entitled to the claim of RM1,354.20 on the basis that it is in fact a claim by an insurance company when in fact the identity of the insurance company has not been sufficiently established as no evidence has been given in court by the plaintiff.

(7) That the learned magistrate erred in law in not holding that there is prima facie evidence of delivery of the 100 bags of dates by the defendant to the plaintiff as the defendant has not given notice of the loss of the 53 bags of dates to the defendant within three days as required under r 6 of art III of the Merchant Shipping Ordinance 1960.

The facts as found by the learned trial magistrate are as follows, briefly:

(a) the respondent imported 326 packages and bags of spices products from Singapore which amongst them were 100 bags of dates;

(b) the respondent utilized the appellant's vessel called 'Lin Petaling III' to bring the imported products to Kuching;

(c) the terms of the relationship between the respondent and the appellant were contained in the bill of lading issued by the appellant on 18 March 1989;

(d) on 28 March 1989 the respondent went to clear the imported products from the Kuching Port Authority and discovered the goods were short landed;

(e) the respondent had since been indemnified by the insurance company for the loss of the goods in the sum of RM1,354.00; and

(f) the claim against the appellant was therefore by the insurance company under the doctrine of subrogation.

(i) *Ground one*

This ground of appeal is against a finding of fact of the learned trial magistrate. The thrust of the argument of the learned counsel for the appellant is that exh P4 (the customs declaration which was declared by the respondent) is inconsistent with exhs P5 and P6 which were made some five months after the event. Yet, as submitted by the learned counsel for the appellant, the learned trial magistrate gave undue weight to exhs P5 and P6 without considering exh P4 which was a contemporaneous documentary evidence. Learned counsel also says that exh P4 does not indicate any loss of the goods. So he submits that the goods must have been discharged by the vessel of the appellant.

Having read the appeal record including the judgment of the learned trial magistrate I do not find any ground to interfere with the finding of fact. The learned trial magistrate believed the evidence of the respondent and the letters from the Kuching Port Authority which are exhs P5 and P6 and found that the appellant failed to prove its defence as contained in paras 4 and 5 of the statement of defence. As an appellate court such finding of the learned trial magistrate should not be substituted without valid reason (see *JB Jeyaratnam v Law Society of Singapore*[1]).

It is to be noted that for reason best known to the appellant the tally sheet which would have cleared any doubt as to whether or not the goods were landed by the said vessel, were not tendered as an exhibit by the appellant at the trial although DW1 Lee Kim Jee testified that the appellant's delivery order was in accordance with its tally sheet prepared by a clerk and that both the Kuching Port Authority and the appellant had a tally clerk during the unloading of goods from the vessel. Such a conduct therefore would surely attract the effect of s 114(g) of the Evidence Act 1950 (see *Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor*;[2] *'The American Astronaut'*[3] and *'Lexa Maersk'*[4]). I note that a document which appears to be a tally sheet has been incorporated into the appeal record but I find nothing in the notes of proceeding indicating that such a document has been admitted as an exhibit during the trial. Accordingly I do not think I can consider it at all.

Learned counsel for the appellant also submits that the goods were delivered and there was a prima facie evidence of their delivery due to the failure of the respondent to give notice in writing within three days as required by law. In reply, learned counsel for the respondent submits that non-notification or late notification under the law is not fatal. I have considered the arguments and the relevant law and I agree with the learned

counsel for the respondent. In any case it is for the respondent in order to succeed in his claim to prove that he has suffered loss or damage. The three days notification requirement is not a time limitation provision and thus even without such notification so long as loss can be proven, as in this case, the respondent succeeds (see *The Law in Singapore on Carriage of Goods by Sea* by Tan Lee Meng (1986 Ed) at p 232).

Accordingly I find no merit on this ground of appeal.

(ii) *Ground two*

In view of my conclusion on ground one above and for the same reason I also find no merit in this ground.

(iii) *Ground three*

For this ground it is the contention of the learned counsel for the appellant that the insurance company should have pleaded subrogation and the learned trial magistrate erred in law in concluding without any basis that it was not necessary. Having read the judgment of the learned trial magistrate on this issue I do not think she did as alleged by the learned counsel. In fact the learned trial magistrate indulged in great length on this issue making references to views of learned author SR Derham on his book entitled *Subrogation in Insurance Law* and the case of *Wilson v Raffolovich*.[5] I have considered the finding of the learned trial magistrate both in fact and in law and I do not find them to be in error. In the case of *Teo Kim Kien & Ors v Lai Sen & Anor*[6] his Lordship Chang Min Tat FJ has this to say on the issue of subrogation at p 126I (right):

> This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrongdoer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrongdoer the insurer has no cause of action of his own: per Lord Diplock in *Hobbs v Marlowe* [1978] AC 16 at p 37.

Similar view was expressed by his Lordship Gunn Chit Tuan J (as he then was) in the case of *Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor*[2] at p 484I (left) to A–E (right) where he said this:

> After plaintiff's counsel has made his speech in reply, Mr Ponniah sought leave to address the court on two matters. He stated briefly that subrogation had not been pleaded and there was no evidence of it; but when asked by the court, counsel was not able to quote any authority to show that subrogation must be pleaded. Counsel also stated briefly that the *Port Swettenham Authority*'s case [1978] 2 MLJ 137 could not be relied on because the duty of care there was lower than in this case.
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> Be that as it may, the doctrine of subrogation has been explained as follows in 16 *Halsbury's Law of England* (4th Ed) at p 969:
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> > 'Where one person has a claim against another, in certain circumstances a third person is allowed to have the benefit of the claim and the remedy for enforcing it, even though it has not been assigned to him, and he is then said to be subrogated to the rights of the first person.'

A In this case there was no evidence that the benefit of the claim has been assigned so that the insurance company could sue the defendants in its own name: see *The London Assurance Co v Sainsbury & Anor* (99 ER 636). But even in the absence of a formal assignment, as there was evidence that the insurance company concerned had paid under the insurance policy it was entitled to the benefit of all rights possessed by the assured, ie the plaintiff in respect of the loss insured B against (*Castellain v Preston* (1883) 11 QBD 380). It was entitled to enforce the right of action in the plaintiff's name against the defendants who have caused the loss (*R v Victoria Insurance Co Ltd* [1896] AC 250).

I find no reason to disagree with the views expressed by their Lordships and accordingly this ground three fails.

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(iv) *Ground four*

Having perused the statement of defence I am of the view that this ground should not have arisen as this issue was not pleaded as a defence. It only arises due to the ruling of the learned trial magistrate which, with respect, D I do not think to be the correct position of the law. In the case of *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd*[7] at p 303 E–F (right) his Lordship Wan Hamzah SCJ said this:

> These issues brought up at the trial has not been pleaded in the statement of defence, and this was a contravention of O 18 r 8 of the Rules of the High Court, E and therefore the contentions should not have been entertained (*AG v Lord Mayor etc of City of Sheffield* (1912) 106 LT 367).

Order 18 r 8 of the Rules of the High Court 1980 is in pari materia to O 14 r 14(1) of the Subordinate Courts Rules 1980. If a party does not wish to rely on a certain issue as a basis for a claim or as a defence it is not the F function of the court to consider such issue in coming to a decision (see *Tio Chee Hing & Ors v Government of Sabah*[8]); except in certain cases as for instance where the illegality is ex facie or where the evidence adduced at a trial clearly shows illegality (see *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*[9]).

G Again in *Kiaw Aik Hang Co Ltd v Tan Tien Choy*[10] at p 101B (left) his Lordship Buttrose J said this:

> The case, in my view, must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.

H In the present case even after the ruling of the learned trial magistrate, the appellant made no application to amend its pleading. Thus, for the foregoing reason alone I find this ground fails.

In the event that I am wrong in my foregoing conclusion, I have also considered the contentions of the learned counsel for the appellant and the respondent. It is not in dispute that the provisions of the Hague Rules are I applicable to the bill of lading (exh P1) in this case by virtue of the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Ship Owners and Others) Regulations 1960 (hereinafter called 'the 1960 Regulations').

Clause 4 of the bill of lading (exh P1) issued by the appellant to the respondent provides:

(A) The carrier shall be under no such responsibility

(i) at any time prior to the loading of the goods on to and subsequent to the discharge of the goods or part therefore from the vessel when but for the provisions of this clause such goods would be the responsibility of the carrier and

(ii) in the case of live animals or of cargo which in this bill of lading is stated as being carried on deck and is so carried (none of which is subject to the legislation referred to in cl 1 hereof) at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier.

(B) Fish, fruits, vegetables and all perishable goods to be handled and carried at the sole risk of the shipper. Breakage of glass, china, castings and other goods of a bottle or fragile nature shall be taken to be due to inherent defect, quality or vice of the goods or insufficiency of packing in the absence of evidence of negligence, fault or failure in the duties and obligations of the carrier.

For the sake of convenience the relevant statutory provisions are reproduced as follows:

(a) The Schedule of the 1960 Regulations provides:

(i) Article III r 2 reads:

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

(ii) Article III r 6 reads:

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carriage of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damages unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(iii) Article III r 8 reads:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations

provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

(a) Article IV r 2 reads:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
(b) fire, unless caused by the actual fault or privity of the carrier;
(c) perils, dangers and accidents of the sea or other navigable waters;
(d) act of God;
(e) act of war;
(f) act of public enemies;
(g) arrest or restraint of princes, rulers or people, or seizure under legal process;
(h) quarantine restrictions;
(i) act or omission of the shipper or owner of the goods, his agent or representative;
(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
(k) riots and civil commotions;
(l) saving or attempting to save life or property at sea;
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
(n) insufficiency of packing;
(o) insufficiency or inadequacy or marks;
(p) latent defects not discoverable by due diligence;
(q) any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

I shall now deal with the construction of cl 4(B) of the bill of lading (exh P1) in the light of the relevant statutory provisions.

Learned counsel for the appellant submits that cl 4(B) of exh P1 is a blanket clause covering not only the deterioration of perishable goods (in this case the goods) but also their disappearance whilst on board the vessel. If such a construction is given to cl 4(B) then I think it would be inconsistent with r 2 of art III as it would affect the manner of carrying out of the duties agreed by the appellant and consequently null and void and of no effect in view of r 8 of art III. It is to be noted that art III r 8 prevents a carrier from restricting his liability for carrying out an operation which under the contract it has agreed to perform. Once the scope of the contract has been defined by the parties, art III r 2 defines the terms of the agreed scope of duties. Thus art III r 8 prevents the carrier from restricting its liability below the requirements of art III r 2 (see *Modern Bills of Lading* by Paul Todd (2nd Ed)). Further, I do not think art IV r 2 is wide enough to allow such a construction as submitted. Thus, in my view cl 4(B) cannot be taken to be

a blanket protection to the appellant as a result of the total loss or disappearance of the goods. In fact to give cl 4(B) a meaning so as to exempt the appellant from liability due to deterioration of the goods is being liberal in view of r 1(c) of art III which reads:

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
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> ...
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> (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(See *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd*[11] where it was held by the House of Lords that the burden was upon the ship owners to prove that they were protected from liability by art IV r 2.)

A further point that I have considered is that the conditions in exh P1 must be interpreted contra preferentum (see *Steel v The State Line Steamship Co*[12]). On reading cl 4(B) in the light of the other clauses of exh P1 it cannot be said that it covers a total loss of the types of goods mentioned therein. If it had been the intention then I find no reason why only the total loss of perishable good is covered and not other types of goods. After all exh P1 is a standard printed document of the appellant. Thus, I can only conclude that at best cl 4(B) only deals with the decay or deterioration of perishable goods and not where there is a total loss of disappearance of the perishable goods as in this case.

Accordingly this ground four also fails.

(v) *Grounds five and six*

I shall deal with these two grounds together as they involve a similar issue. In view of my finding on ground three of this appeal, ground five has no merit. I do not think that the failure to call any witness from the insurance company can be taken as fatal to the claim of the respondent. As for ground six it is my view that besides my finding on ground three above, I only have to quote in agreeing with what his Lordship Chang Min Tat FJ at p 126I (right) to p 127 A–B (left) has to say in the case of *Teo Kim Kien & Ors v Lai Sen & Anor*:[6]

> If the damages suffered by the insured himself either to his person or to his car had been settled and paid to him by the insurer under the policy of comprehensive insurance, the doctrine of subrogation still applies and the insurer may require the insured to take an action against the wrongdoer for the recovery of all the damages flowing from the latter's negligence. The insured's own interest in the action may be limited to the first part of the damage claim which he had to pay under the excess clause or to the excess of his personal injury claims over what he had been paid by the insurer. If the action succeeds and he recovers a sum in settlement of his claims, he is bound to refund to the insurer what his insurer had paid to him under the policy of insurance.

And in *Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor*[2] his Lordship Guan Chit Tuan J (as he then was) at p 484 E–F said this:

A The defendants cannot raise as a defence or in mitigation of damages the fact that the plaintiff as the assured has been indemnified by the insurance company (*Mason v Sainsbury* [99 ER 538] and *Clark v Blything Inhabitants* [107 ER 378]).

As such ground six fails.

B (iv) *Conclusion*

For the foregoing reasons this appeal is dismissed with costs.

As for my observation on the conduct of this appeal, I can only say that there was hardly any local authority cited by learned counsel to support their arguments. The vision to establish our own Malaysian common law C and body of judicial precedents will be very much impaired if such an attitude is epidemic in this country!!!

Appeal dismissed.

Reported by Bahma Sivasubramaniam

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